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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-451

ALABAMA POWER COMPANY,
Petitioner,

V.

RAYMOND E. DAVIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not officially reported, is set forth at App. 48. The opinion of the United States District Court for the Northern District of Alabama is reported at 383 F.Supp. 880 (N.D. Ala. 1974), and is set forth at App. 22.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 1, 1976 (App. 49). The petition for Writ of Certiorari was filed on September 28, 1976, and was granted on January 10, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1) (1970).

STATUTE INVOLVED

The Military Selective Service Act § 9, ch. 625, § 9, 62 Stat. 604, 614 (1948) [50 U.S.C. App. § 459 (1970)], *as amended*, 38 U.S.C. § 2021 (1974). (App. 51).

QUESTION PRESENTED

Whether the seniority provision of Section 9 of the Military Selective Service Act requires military service to be credited in computing the amount of retirement income under privately-funded pension plans where the amount of retirement income under such pension plans is dependent upon a substantial work requirement?

STATEMENT OF THE CASE

On December 20, 1972, Raymond E. Davis ("Davis") brought this action in the United States District Court for the Northern District of Alabama, Southern Division, for injunctive relief to compel Alabama Power Company ("Alabama Power") to grant Davis Accredited Service, as defined hereafter, for purposes of computing retirement income under Alabama Power's Pension Plan during the period of time Davis was in the military service. Davis' claim was asserted under the Military Selective Service Act, 50 U.S.C. App. § 459 (1970) upon which jurisdiction of the trial court was based.[1] The case was tried without a jury in the United States District Court for the Northern Dis-

1. The Act was originally enacted at 54 Stat. 885. In 1948, it was amended at 62 Stat. 614. The name of the Act was changed in 1951 to the Universal Military Training and Service Act, 65 Stat. 75. In 1967, it was renamed the Military Selective Service Act of 1967, 81 Stat. 100, and in 1971 was changed to the Military Selective Service Act, 85 Stat. 348. The "Vietnam Era Veterans' Readjustment Assistance Act of 1974," P.L. 93-508, 88 Stat. 1578 (December 3, 1974) has recodified these provisions in 38 U.S.C. § 2021. The present §§ 9(b) and 9(c)(1) have remained largely unchanged since 1940 and § 9(c)(2) has been preserved in its current form since the amendments of 1948.

trict of Alabama. The court held that the computation of the retirement income under Alabama Power's Pension Plan was a perquisite of seniority, and therefore Davis' period of military service must be considered for the purpose of computing such retirement income.

On July 1, 1976, the Court of Appeals for the Fifth Circuit affirmed the order of the District Court. This Court granted certiorari on January 10, 1977.

The facts below were agreed to by the parties and are set forth in full as the Agreed Statement of Facts in App. 15-20. Such facts include the following:

Davis was first employed by Alabama Power on August 16, 1936, in a position other than temporary and continued to be employed until March 18, 1943, when he left to perform military service beginning on March 30, 1943, with the Armed Forces of the United States. On October 1, 1945, Davis completed his military service and was reinstated by Alabama Power on October 8, 1945. Davis continued in that employment until June 1, 1971, at which time he retired from employment with Alabama Power.

On July 1, 1944, Alabama Power established a Pension Plan for its employees. A copy of this Pension Plan, as amended to and including the amendment of January 1, 1971, appears at App. 54, et seq.

With respect to treatment of military service, except for certain provisions not applicable to Davis,[2] the Pension Plan has at all times provided that periods of "leaves of absence without regular pay" and military service do not constitute Accredited Service as defined in the Pension

2. The amendment of January 1, 1966, allows veterans to substitute service with Alabama Power prior to the employee's twenty-fifth (25th) birthday, less one qualifying year, as "Accredited Service" for certain military service time. (See § III(3)(a) of the Plan). This provision, however, did not affect Davis since he had no service with Alabama Power prior to his attaining twenty-five years of age. (App. 16).

Plan. (See Sections II.2 and III of the Pension Plan) (App. 59-62).

All contributions to the "Pension Plan Trust Fund" are made by Alabama Power. The amount of these contributions is determined annually on an actuarial basis taking into account factors including, among others, the number of full-time regular employees of Alabama Power who are covered by the Pension Plan, their Accredited Service, and their earnings. The Pension Plan Trust Fund is not funded to pay retirement income based upon the inclusion of military service time as Accredited Service (App. 60).

The Pension Plan of Alabama Power has been the subject of negotiations between Alabama Power and various Local Unions of the International Brotherhood of Electrical Workers since 1950, including Local No. 841 of which Davis was a member at the time of his retirement, and it has been a part of the collective bargaining agreement between Alabama Power and the various Local Unions of the International Brotherhood of Electrical Workers since July, 1961, including Local No. 841.

All *full-time regular* employees of Alabama Power who have completed one year of service with Alabama Power and have attained the age of twenty-five (25) years are included in the Pension Plan. Employees other than full-time regular employees, such as part-time employees and emergency employees, are not included in the Pension Plan and are not eligible to accrue Accredited Service thereunder (see Sections II and III of the Plan) (App. 58 & 60). Pursuant to established directives and practices of Alabama Power, a full-time regular employee is one who is employed on a full-time basis for an indefinite period of time. The full-time regular work week of Alabama Power consists of forty (40) hours per week and regular daily work consists of eight (8) scheduled hours of work per day. With respect

to employees other than those exempted under the Fair Labor Standards Act, hours worked in excess of forty (40) hours per week require overtime compensation. For purposes of the Pension Plan, "earnings" do not include pay for overtime hours (see Pension Plan, Section V.7, at App. 73).

Pursuant to the collective bargaining agreement and the employment policies and practices of defendant, exceptions to, or off-time, from the regular full-time work week are as follows:

(1) from two weeks to five weeks annual vacation, the length of such vacation depending upon the length of the employee's service;
(2) eight holidays per year;
(3) annual sick leave up to ten work days per year or accumulation of a maximum of thirty work days; and
(4) up to three work days as a result of death in the immediate family of an employee.

The periods of time referred to above and enumerated as (1) through (4), inclusive, are with full pay and constitute Accredited Service under the Pension Plan. At Alabama Power's discretion and depending on the circumstances presented, in some cases employees, deserving of such in the opinion of Alabama Power, are allowed up to a maximum of nine (9) months extended sick leave with pay which time is considered by the Retirement Board as Accredited Service for purposes of the Pension Plan. The maximum of nine (9) months is allowed only where the employee has in excess of twenty years service and is considered deserving of such because of his employment record.

According to employment practices and policies of Alabama Power, under no circumstances may an employee be off work without pay in excess of thirty (30) calendar days

without such absence affecting his full-time employment status. The maximum thirty day period of time in which an employee may be off from work without pay is allowed only in cases of extended sickness. Brief, infrequent periods of absence without pay may be permitted for employee emergencies such as family sickness and transportation problems. Such periods of absence without pay do not affect the employee's full-time employment status and constitute Accredited Service under the Pension Plan. If for any reason an employee is off from work without pay for more than thirty calendar days, the total unpaid absence is retroactively deducted from the employee's Accredited Service for purposes of the Pension Plan. The occasions where an employee is permitted time off without pay for extended sickness or personal emergencies under this practice and policy of Alabama Power are infrequent and are not allowed by the company to be abused by employees. Such employment practices and policies do not permit, for example, an employee returning to work after a period of such unpaid sick leave and then qualifying or obtaining a second or successive period of unpaid sick leave to avoid the maximum thirty calendar day limitation.

Davis' Accredited Service under the Pension Plan commenced August 16, 1937, one year after his employment date. Davis accrued Accredited Service from such date until June 1, 1971, when he retired, except for the time spent in military service and a period of time Davis participated in a union strike. When Davis retired he received $198.95 per month retirement income under Alabama Power's Pension Plan. Had Davis received Accredited Service for his period of military service, he would have been entitled to $216.06 per month.[3]

3. Davis' retirement income was based upon § V.4 (ii) of the Pension Plan. The computation of the amount of his benefits, with certain adjustments, is based upon his years of Accredited Service (App. 70).

SUMMARY OF ARGUMENT

Well-reasoned opinions construing Section 9 of the Military Selective Service Act[4] ("Act") have found the requirement that a veteran's "seniority" be restored upon reemployment does not include any employment benefits which are conditioned upon a bona fide work requirement. Where a benefit is intended to be a form of deferred compensation for work performed, the veteran must perform the necessary work requirement for his employer before earning the benefit. The benefit in this case, Accredited Service under the Pension Plan, is conditioned upon a substantial bona fide work requirement. This work requirement was not satisfied and, as a result, this benefit was not earned by Davis.

While the legislative history of the Act does not provide substantial guidance in interpretation of the reemployment provisions of the Act, such legislative history as is available clearly shows that it was not envisioned that employers would fund pension plans on behalf of veterans during their military service. Any such requirement that an employer fund a pension plan during the military service of an employee not only is outside the mandate of the Act but also is manifestly unfair and unjust. Moreover, a requirement that military service time must be credited in computing the amount of pension benefits would threaten the actuarial soundness of this and other similarly situated pension plans.

4. 50 U.S.C. App. § 459 (1970), 62 Stat. 604, 614.

ARGUMENT

The express provisions of Section 9 of the Military Selective Service Act do not require credit for military service in computing the amount of pension benefits where the computation of such benefits is not a function of seniority.

The provisions of Section 9 which are applicable to the reemployment rights of a returning veteran are as follows:

> "(b) Reemployment Rights.
>
> In the case of any such person who, in order to perform such training and service, has left or leaves a position . . . in the employ of any employer and who . . . (2) makes application for reemployment within 90 days after he is relieved from such training and service . . .
>
> * * *
>
> (B) If such position was in the employ of a private employer, such person shall—
>
> (i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like *seniority, status* and *pay*; . . .
>
> * * *
>
> (c) Service Considered as Furlough or Leave of Absence.
>
> (1) Any person who is restored to a position in accordance with the provisions of paragraph . . . (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored *without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at such time such person was inducted into such forces,* and shall not be

> discharged from such position without cause for one year after such restoration.
>
> (2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph 9 . . . (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." (Emphasis Added) [5]

Davis claims that pension benefits generally, and specifically the amount of retirement pay under the Pension Plan, are perquisites of seniority and therefore must be included as Accredited Service in computing his retirement income notwithstanding the contrary provisions of the Pension Plan. Alabama Power's position is that entitlement to the pension benefit in question should be determined by the express terms of the Pension Plan which clearly establish that such a benefit does not arise from seniority. Alabama Power's position is entirely consistent with the decision of this Court in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225, 229 (1966) [6] where it was recognized that the term "seniority" was not defined in the Act, but rather its content was derived from private employment practices and agreements. The Pension Plan excludes from Accredited Service time in the Armed Forces as well as all other time on furlough or leave of absence without regular pay (§ II.2, App. 59-60). The treatment of Davis by Alabama Power was identical with the established rules and practices of Alabama Power relating to employees on furlough or leave of absence without regular pay (App. 16).

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5. 50 U.S.C. App. §§ 459 (b) (B) (i), (c) (i) (1970), 62 Stat. 604, 615-16. § 9 is set out in full at App. 51.

6. Accardi v. Pennsylvania R. Co. is discussed in more detail *infra*.

Although the legislative history concerning the reemployment provisions of the Act is not extensive,[7] the remarks on the Senate floor during the debate on the 1940 Act[8] lend strong support to the position that a veteran is not to be given credit for his military service time when computing the amount of his pension benefits. In discussing Senate Bill 4164 on August 9, 1940, the following exchange took place in the Senate:

> "Mr. DANAHER. Mr. President, now let me refer the Senator from Texas to the provision on page 24, which reads:
>
> (c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be so restored without loss of seniority, insurance participation or benefits, or other benefits, and such person shall not be discharged from such position without cause within 1 year after such restoration.
>
> Let me ask the Senator, please if he feels that Congress properly can superimpose upon an existing contract of employment between a substitute, if you choose, for a conscriptee and the employer a clause which will so operate as to cause the employer to rehire and to restore the conscriptee to his former position?
>
> Mr. SHEPPARD. Frankly, I do not know. We are trying to do everything we can to help the men called into the service get back their jobs.
>
> Mr. DANAHER. Then, let me ask if it is the understanding of the Senator that, under the clause providing that the conscriptee shall be restored without loss of insurance participation or benefits, that someone else is going to make up somehow to, let us say, the employer's reserve fund the amount of contribution which the particular employee formerly paid into that fund?
>
> Mr. SHEPPARD. That provision refers solely to the benefits to which he was entitled up to the time he left his employment. It does not apply to the time when he was absent in the service.
>
> Mr. DANAHER. But when the bill provides that he shall be restored without loss of insurance participation or benefits, or other benefits, is it meant by that that if a man goes out to serve his country under this conscription plan and comes back he assumes his prior status less 1 year's payment?
>
> Mr. SHEPPARD. That is what this bill intends, as I understand. That is what the members of the committee thought should be and could be done.
>
> Mr. DANAHER. It is not a case of someone else from some source making up those payments?
>
> Mr. SHEPPARD. No."[9]

The above discussion indicates that the intent of the bill was not to require the employer to continue funding the pension plan on behalf of the employee during his absence in the military.

The action of Congress in 1948 in adding subsection 9 (c) (2) to the Act did not change the legislative intent that a veteran would not be given credit under the Act for pension benefits during his military service.[10]

7. The Committee Reports do not provide any guidance as to the intent of the grant of reemployment rights in the Act. See S.Rep. No. 2002, 76 Cong., 3d Sess. (1940); H.Rep. No. 2937, 76 Cong., 3d Sess. (1940) (conference report); S.Rep. No. 1268, 80th Cong., 2d Sess. 16 (1948). The legislative history of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 does not add any further guidance.

8. Act of September 16, 1940, Ch. 720 § 8, 54 Stat. 890.

9. *See* 86 CONG. REC. 10,107 (Responses of Senator Sheppard to questions of Senator Danaher, August 9, 1940).

10. 50 U.S.C. App. § 459(c) (2) (1970), 62 Stat. 604, 615-16. § 9(c) (2) codified the "escalator principle" which was enunciated by this Court in Fishgold v. Sullivan Drydock & Repair Co., 328 U.S. 275, 285 (1946).

The "work requirement" principle confirmed in *Foster v. Dravo Corporation* applies to the treatment of pension benefits under the Act.

Section 9 of the Act does not elevate a veteran to a status which would entitle him to an employment benefit where the benefit is conditioned upon a substantial work requirement which is not satisfied.[11] The most recent confirmation of this principle is in this Court's opinion rendered in *Foster v. Dravo Corporation*.[12] There, the veteran worked the first seven weeks of 1967, before leaving for military service. Upon returning eighteen months later, the veteran worked the last thirteen weeks in 1968. The applicable collective bargaining agreement required employees to work a minimum of 25 weeks in each calendar year in order to earn full vacation benefits. Because this actual work requirement was not satisfied by the veteran, he was not allowed such benefits for either 1967 or 1968. Both the district court and the Court of Appeals for the Third Circuit agreed that since the vacation benefits in question did not accrue automatically with continued employment, but rather were based on a substantial work requirement, the returning veteran had no right based on the Act to the benefits without satisfying the employer's work requirements. The Supreme Court granted certiorari. In reviewing its past treatment of Section 9 of the Act, this Court stated that the Act has consistently been applied to assure that those benefits which would *necessarily* have accrued by virtue of mere continued employment would not be denied simply because

11. *See, e.g.* Foster v. Dravo Corp., 420 U.S. 92 (1975) (vacation pay); Jackson v. Beech Aircraft Corp., 517 F.2d 1322 (10th Cir. 1975) (pension); Litwicki v. Pittsburgh Plate Glass Indus., Inc., 505 F.2d 189 (3d Cir. 1974) (pension); Austin v. Sears, Roebuck & Co., 504 F.2d 1033 (9th Cir. 1974) (vacation pay); Kasmeier v. Chicago R.I. & Pac. R. Co., 437 F.2d 151 (10th Cir. 1971) (vacation pay).

12. 420 U.S. 92 (1975).

of the veteran's military service. This Court then stated as follows:

> "[W]here the claimed benefit requires more than *simple continued status* as an employee, the Court has held that it is not protected by the statute. See McKinney, supra, 357 U.S., at 273, 2 L.Ed. 2d 1305; Tilton v. Missouri Pacific R. Co., 376 U.S. 169, 181, 11 L.Ed. 2d 590, 84 S.Ct. 595 (1964)." 420 U.S., at 97. (Emphasis Added)

Alabama Power insists that the principle set forth in *Foster* applies with full force to the instant case and to pension benefits in general. Application of this principle to the pension benefit here in question is consistent with the Act and is the only principle which is fair to the employer, the veteran and other non-veteran employees. Unless otherwise specifically provided by an employment agreement, to give a veteran increased retirement benefits simply because he was in the military and to deny the same benefits to other employees on furlough or leave of absence without pay would be unjust.

In *Foster* the applicable collective bargaining agreement required an employee to work at least 25 weeks in each calendar year to receive a vacation. While recognizing that a Dravo employee *theoretically* could earn full vacation benefits by doing as little as one hour's work in each of twenty-five weeks during the year, the Court, employing a more logical, realistic and practical view, found that the "plain indication" of the agreement was that a full vacation was intended "in most cases" to be awarded for a full year's work.[13] Noting that a work requirement could be so insubstantial that it would appear to be designed to measure time on the payroll rather than hours on the job, the Court went on to state that:

13. 420 U.S. at 100.

> "[W]here the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee." 420 U.S. at 99-100.

In that case, upon a finding that the veteran had not satisfied the work requirement specified in the collective bargaining agreement, the Court held that the Act did not entitle the veteran to the claimed vacation rights.

The logical extension of the principle in *Foster* to the present case does not leave the veteran unprotected where the benefit is conditioned upon a transparent or insubstantial work requirement. The protection afforded a veteran in such a case is discussed fully by this Court in *Accardi v. Pennsylvania R. Co.*[14] In *Accardi*, the question before the Court was the eligibility of several veterans for severance payments under the Act. There, the veterans worked as firemen on tugboats owned by their employer. Each veteran left his employment for military service and returned to work shortly after discharge and worked thereafter until 1960. In 1959, as a result of a strike and labor dispute regarding the necessity for firemen, a settlement agreement was reached which provided that firemen with less than 20 years' seniority were to be discharged and paid separation pay based on length of "compensated" service. With respect to determining the length of compensated service, the agreement defined a month of compensated service as any month in which an employee worked one or more days, and defined a year of compensated service as 12 such months or a major portion thereof. In computing the compensated service of veterans, years spent in the military were not counted. This Court held that the years in military service had

14. 383 U.S. 225 (1966).

to be treated as compensated service for the purposes of computing the severance pay. The Court stated that the severance agreement defined compensated service in such a manner as to make it possible for an employee to receive credit for an entire year by working a mere seven days. The agreement made no distinction between an employee who worked these seven select days, or a part-time employee, and an employee who worked 365 days during the year. In view of this "bizarre result," this Court decided that compensated service was equivalent to mere length of service rather than actual total service rendered. The Court found that the "real nature" of the severance pay under that agreement was to compensate for lost jobs which was to be measured not by the amount of work an employee did in the past, but by the rights and benefits forfeited by losing the job. The severance payments in *Accardi* were held to be ". . . just as much a perquisite of seniority as the more traditional benefits such as work preference and order of layoff and recall." 383 U.S. at 230. Simply stated, the "work requirement" in *Accardi* was found to be insubstantial. It is important to note that there was no significant work requirement in *Accardi* as there is in Alabama Power's Pension Plan.

In contrast to the circumstances in *Foster* where the veteran had not satisfied the work requirement, in *Eagar v. Magma Copper Co.*,[15] this Court had before it a situation where the veteran had completed all work requirements but had not satisfied an anniversary date requirement unrelated to work. There, the question was whether or not the veteran should be granted vacation pay for the work year following March 12, 1958. The veteran began working for his employer on March 12, 1958, entered the military service on March 6, 1959, and returned to work on May 2, 1962.

15. 389 U.S. 323 (1967).

A collective bargaining agreement provided that vacation benefits were available to employees who had worked 75% of the annual shifts *and were employed on the one-year anniversary date of their employment*, which was March 12 in that case. The Ninth Circuit Court of Appeals denied the veteran relief. The Supreme Court reversed the Ninth Circuit opinion *per curiam* citing *Accardi*. Since the veteran was being denied his benefit solely because he was not present on the one-year anniversary date, there was no real work requirement remaining to be satisfied. The denial of the benefit was based solely on a matter of status which could be satisfied by merely being on the payroll on a particular day — a situation which was fully protected by the Act.

The treatment of veterans under Alabama Power's Pension Plan is completely consistent with the Act as construed by this Court in *Accardi*, *Eagar* and *Foster*. Unfortunately, the opinion in *Foster* was rendered after the district court opinion in the present case. Both the district court and the appellate court opinions rendered in this case are clearly inconsistent with *Foster*. Alabama Power contends that the principles of *Foster* apply equally to pension benefits and, therefore, the question becomes whether the work requirement in the Pension Plan of Alabama Power constitutes a bona fide effort to compensate for work actually performed.[16] If such a work requirement exists, then the Act does not require Alabama Power to compensate Davis in the form of increased retirement pay based on military service time.

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16. In this case the District Court resolved this issue by quoting from the Fifth Circuit case of Ball v. Victor Adding Machine Co., 236 F.2d 170 at 173, 174 (5th Cir. 1956), which held that pension benefits were as much a part of an employee's "wages" as the money paid to him at the time of rendition of his services (App. 36-38). *See* Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

In holding that the computation of retirement benefits under the Pension Plan was based solely upon seniority, the district court disregarded the substantial work requirement expressly provided for in the Pension Plan (App. 30). An examination of the Pension Plan establishes that pension benefits are directly related to and dependent upon work performed and compensation earned on a full-time regular basis. The express language of Section II of the Pension Plan (App. 58) specifies that only *full-time regular* employees of Alabama Power who have completed one year of service and attained the age of twenty-five (25) years are included in the Pension Plan (§ II of the Plan, App. 58). As stipulated to by the parties in the Agreed Statement of Facts (App. 17), according to directives and practices of Alabama Power, a full-time regular employee of Alabama Power is an employee who is employed on a full-time basis for an indefinite period of time. The full-time regular work week of Alabama Power consists of forty (40) hours per week and regular daily work consists of eight (8) hours of work per day (App. 17). In this regard, employees other than full-time regular employees, such as part-time employees and emergency employees, cannot meet this work requirement and therefore are not included in the Pension Plan and are not otherwise eligible to accrue Accredited Service thereunder (App. 17).

Each and every exception to the full forty (40) hour work week requirement is consistent with traditional employment practices. Moreover, such a requirement is equally applicable to all employees, and certainly does not render the work requirement insubstantial or transparent. The district court incorrectly disregarded the substantial work requirement of the Pension Plan by giving undue emphasis to a concept calling for precise matching of the amount of

deferred compensation to units of work. The erroneous reasoning of the district court was the result of substantial reliance on the provisions of the VETERANS' REEMPLOYMENT RIGHTS HANDBOOK[17] which expresses the view that military service time must be treated as Accredited Service for all pension plan purposes unless the benefit constitutes "precise additional pay for units of work done"[18] (App. 34-35). The principles of this Court as set forth in *Foster* are controlling over the VETERANS' REEMPLOYMENT RIGHTS HANDBOOK and, rather than requiring an unduly rigid standard, provide practical, realistic and workable guidelines. Alabama Power understands this to be the intent of this Court where it stated in *Foster* that where the work requirement is a good faith effort to compensate for actual work performed, *"the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee."* (Emphasis Added) 420 U.S., at 99-100.

The undue emphasis of the district court on a lack of precise correlation between the amount of deferred compensation and units of work is vividly demonstrated by the court's treatment of the provision of the Pension Plan which excludes overtime pay from "earnings" (App. 73). It is submitted that much greater exceptions to the correlation between compensation and units of work are needed to destroy the legitimacy of the work requirement than those exceptions which exist in Alabama Power's Pension Plan.

Although the proper treatment of pension benefits under the reemployment provisions of the Act has not been presented to this Court, the question has been considered

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17. U.S. Dep't of Labor, VETERANS' REEMPLOYMENT RIGHTS HANDBOOK (1970).
18. Id., at 97.

by the Third,[19] Ninth,[20] and Tenth[21] Circuit Courts of Appeal. The Third and Tenth Circuits, using the same rationale as in *Foster*, have held that a veteran must meet any real work requirements under the applicable plan before being entitled to pension benefits.[22]

The only other circuit court, other than the Fifth Circuit in the instant case, to consider the treatment of pension benefits under the Military Selective Service Act was the Ninth Circuit.[23] The Ninth Circuit, although ruling in favor of the veteran, stated that, at least with regard to "future service" under that pension plan, a veteran was not entitled to pension benefits unless he met the plan's work requirement.

Denial of Davis' claim in this case will not infringe upon traditional concepts of "seniority". Such concepts are generally defined in collective bargaining agreements in a manner so as not to be dependent upon a work requirement, and generally relate to such items as automatic promotions, order of layoff, transfer, order of recall, shift assignments and training opportunities. Such "seniority rights" generally are merely a function of time on the payroll and are not dependent upon merit or performance of work requirements. In contrast, the pension benefit in question here is

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19. Litwicki v. Pittsburgh Plate Glass Indus., Inc., 505 F.2d 189 (3rd Cir. 1974).

20. Smith v. Industrial Employers & Distributors Assn., 9th Cir., 75-1327, 75-1333 (Nov. 23, 1976 and Jan. 26, 1977).

21. Jackson v. Beech Aircraft Corp., 517 F.2d 1322 (10th Cir. 1975).

22. *Litwicki* was decided before this Court's decision in *Foster*, but the decision in *Jackson* was rendered several months after the decision in *Foster*. The District Court for the Northern District of Ohio has also come to the same conclusion as the courts in *Litwicki* and *Jackson*. LaPinta v. Ohio Crankshaft, 77 CCH Labor Cases, ¶ 11,156 (N.D. Ohio 1975), *appeal pending*, No. 76-1158 (6th Cir.).

23. Smith v. Industrial Employers & Distributors Assn., *supra*, note 20.

dependent upon a substantial work requirement and is not available to those who do not *earn* the benefit. While the main purpose of the Act is to protect the veteran, the Act was never intended to give a veteran a competitive advantage over fellow employees who have to work long hours in order to earn the benefit.

The crediting of military service time as Accredited Service in the instant case would have the effect of requiring Alabama Power to pay Davis compensation for service he never rendered to Alabama Power. Surely, the Act does not require this result. As a practical matter, such a result would require Alabama Power to continue funding its Pension Plan on behalf of absent employees without knowing when, if indeed ever, such employees would elect to return to work for the company. This is not required by the Act and is inherently unfair and unjust to Alabama Power.

Alabama Power's Pension Plan has never been funded to include periods of military service time as Accredited Service (App. 17). While the monetary amount of Davis' personal claim is not substantial, the principle he urges this Court to accept could have a significant impact upon the actuarial soundness of Alabama Power's pension fund, as well as other funds similarly situated.

Alabama Power respectfully urges this Court to apply the reasoning in *Foster* to this case. This reasoning would afford Davis all rights and benefits which would have come to him solely by virtue of his having the status of an employee of Alabama Power on leave of absence without regular pay, but would not afford him the pension benefit claimed herein which must be earned by performance of a substantial work requirement.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, H. Hampton Boles, one of the attorneys for Alabama Power Company, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 23rd day of February, 1977, I served copies of the foregoing Brief for the Petitioner and the separate Appendix on the several parties thereto, as follows:

1. On the United States, by leaving three copies thereof at the office of Wayman G. Sherrer, Esquire, United States Attorney for the Northern District of Alabama, Federal Building, Birmingham, Alabama, and by mailing three copies in a duly addressed envelope, with first-class postage prepaid, return receipt requested, to Robert E. Kopp, Appellate Section, Civil Division, Department of Justice, Washington, D.C. 20530.

2. On the Solicitor General, by mailing three copies in a duly addressed envelope, with first-class postage prepaid, return receipt requested, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

3. On the Department of Labor, by mailing three copies in a duly addressed envelope, with first-class postage prepaid, return receipt requested, to William H. Berger, Esquire, Department of Labor, Washington, D.C. 20210.

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